IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

FILED

03 MAR 25 AM 10: 16

STATE OF NEW MEXICO, ex rel.,
HONORABLE SARA T. HARMON,

Petitioner,

v. **No.**

ALAN M. VARELA, Director, NEW MEXICO WORKERS' COMPENSATION ADMINISTRATION,

CIV 03- 3[illegible]

Respondent.

NOTICE OF REMOVAL

COMES NOW the Respondent, Alan M. Varela, Director, New Mexico Workers' Compensation Administration, by and through his attorneys, Herrera, Long, Pound & Komer, P.A., and hereby gives Notice of Removal and states to this Court that he is named as a respondent in a civil suit which was filed in the New Mexico District Court, Second Judicial District, County of Bernalillo, Cause No CV 200301761. Pursuant to 28 U.S.C. § 1446(b), this Notice is being filed within thirty days of the date the case became eligible for removal, i.e., the date respondent was served the complaint, March 17, 2003. The petitioner in this case is State of New Mexico, ex rel., Honorable Sara T. Harmon, appearing through J. Edward Hollington.

STATEMENT OF THE GROUNDS FOR REMOVAL

The grounds for removal are that the petitioner's complaint raises federal questions because it requests damages under Section 1983 and 1988. As a result, this action is within the original jurisdiction of this Court by virtue of federal question jurisdiction, 28 U.S.C. § 1331, and is removable pursuant to 28 U.S.C. § 1441(B).

A copy of all pleadings received by the respondent are attached hereto as Exhibit "A". Pursuant to 28 U.S.C. § 1447(b) and D.N.M. LR-Cv 81.1(a)(1992), copies of all New Mexico District Court records of this case existing in the file from the Second Judicial District will be filed with this Court within thirty (30) days of the filing of this notice.

WHEREFORE, defendants hereby give notice of the removal of this action from the New Mexico District Court, Second Judicial District, County of Bernalillo, to the United States District Court for the District of New Mexico.

HERRERA, LONG, POUND & KOMER, P.A.
Attorneys for Respondent

for Judith C. Herrera
P.O. Box 5098
Santa Fe, NM 87502-5098
(505) 982-8405

CERTIFICATE OF SERVICE

I hereby certify that the a true and correct copy of the foregoing Notice of Removal was mailed first-class, postage pre-paid to J. Edward Hollington, 708 Marquette Ave. NW, Albuquerque, New Mexico 87102 and Robert M. Aurbach, P.O. Box 27198, Albuquerque, New Mexico 87125.

for Judith C. Herrera

VERIFICATION

STATE OF NEW MEXICO)
) ss.
COUNTY OF SANTA FE)

Mark E. Komer, being duly sworn, on oath deposes and says that he is the attorney for the respondent, that he has authority to make this Affidavit, that he has read the foregoing Notice of Removal and knows the contents thereof, and that the matters and facts therein mentioned are true to the best of his knowledge and belief.

Mark E. Komer

SUBSCRIBED AND SWORN to before me this 25th day of March, 2003, by Mark E. Komer.

NOTARY PUBLIC

My Commission Expires:
9/15/03

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT COURT

ENDORSED
FILED IN MY OFFICE THIS
MAR 1 2 2003
CLERK DISTRICT COURT

STATE OF NEW MEXICO, ex rel.,
HONORABLE SARA T. HARMON,

Petitioner,

vs. No. CIV ... 761

ALAN M. VARELA, Director, NEW MEXICO WORKERS' COMPENSATION ADMINISTRATION,

Respondent.

VERIFIED PETITION FOR ISSUANCE OF PEREMPTORY WRIT OF MANDAMUS

COMES NOW Petitioner, Honorable Sara T. Harmon, by and through her attorney of record, J. Edward Hollington, J. Edward Hollington & Associates, P.A., and applies to this court for issuance of a Peremptory Writ of Mandamus pursuant to NMSA 1978, § 44-2-1, et seq., and Rule 1-065 (NMRA 2003) and in support of this petition, she states under oath:

I. JURISDICTION AND VENUE

1. Petitioner is a resident of Albuquerque, Bernalillo County, New Mexico.

2. Respondent, Alan M. Varela, is director of the New Mexico Workers' Compensation Administration, which office is located in Albuquerque, Bernalillo County, New Mexico at 2410 Centre Ave., S.E.

3. This court has original jurisdiction over this matter pursuant to NMSA 1978, § 44-2-1.

II. STANDING

EXHIBIT A

4. Petitioner was duly appointed to her position as a Workers' Compensation Judge pursuant to NMSA 1978, § 52-5-2B (a copy of which is attached hereto and incorporated herein as Exhibit 1).

5. Petitioner was appointed to an initial one-year term, and based on a review by the Director of the Workers' Compensation Administration (hereinafter "Director"), she was then appointed to a five-year term as established by Section 52-5-2B (Exhibit 1). Judge Harmon was appointed to a five-year term on April 1, 2002, which term does not expire until March 31, 2007.

6. Petitioner was fulfilling her duties as a Workers' Compensation Judge on February 27, 2003. On that date (February 27, 2003), Judge Harmon received a written notice from Respondent, which notice contained the following language:

> "This is to inform you that effective February 28, 2003, at 5:00 p.m., your exempt appointment as a Workers' Compensation Judge **will be expired.**"
>
> (Emphasis added.)

A copy of the notice is attached hereto as Exhibit 2.

7. Judge Harmon's five-year term had not expired on February 28, 2003.

8. Respondent, Alan M. Varela, as Director of the Workers' Compensation Administration, hereinafter "WCA", is the real party in interest pursuant to Rule 1-065D(2), NMRA 2003.

III. GROUNDS IN SUPPORT OF ISSUANCE OF WRIT

9. Petitioner was appointed to a five-year term as a Workers' Compensation Judge

pursuant to NMSA 1978, § 52-5-2B (Exhibit 1).

10. Pursuant to Petitioner's statutory appointment as a Workers' Compensation Judge, Petitioner is required to conform to all canons of the Code of Judicial Conduct except Canon 21-900 (See, NMSA 1978 § 52-5-2C, attached hereto as Exhibit 1).

11. The statute (52-5-2C) specifies the exclusive grounds for dismissal of a Workers' Compensation judge **prior to expiration of her term**, are violations of the Code of Judicial Conduct. (See, 52-5-2C, attached hereto as Exhibit 1).

12. Pursuant to the statute (52-5-2C), Petitioner can only be removed, prior to the expiration of her five-year statutory term, for cause (violations of the Code of Judicial Conduct). Petitioner has a protected property right to her position pursuant to the Fourteenth Amendment to the United States Constitution and the New Mexico Constitution, Article II, Section 18.

13. Petitioner did not violate the Code of Judicial Conduct and Respondent makes no allegation of such violation against her as grounds for "expiring" her five year statutory term. (See, Notice of Dismissal, attached hereto as Exhibit 2).

14. Petitioner has a clear right to complete her five-year statutory term pursuant to NMSA 1978, § 52-5-2B (Exhibit 1)

15. Respondent has a clear non-discretionary legal duty to not dismiss Petitioner before expiration of her five-year statutory term, unless Petitioner has been found to have violated the Code of Judicial Conduct.

16. Respondent has illegally removed Petitioner from her position as a Workers' Compensation Judge in violation of NMSA 1978, § 52-5-2.

17. Respondent violated Petitioner's constitutional due process rights.

18. Petitioner does not have a plain, speedy and adequate remedy in the ordinary course of law.

19. Petitioner's right to require Respondent to comply with NMSA 1978 § 52-5-2B and C is clear and it is apparent no valid excuse can be given for Respondent's violation of that statute.

IV. RELIEF SOUGHT

20. Petitioner respectfully requests issuance of a Peremptory Writ of Mandamus pursuant to NMSA 1978, § 44-2-7 and Rule 1-065E (NMRA 2003).

21. Petitioner seeks the following relief:

a. Immediate reinstatement to her position as a Workers' Compensation Judge;

b. Payment of salary and benefits retroactive to February 28, 2003;

c. Respondent's action shall not result in an interruption in the term of employment for Petitioner for salary and benefits purposes;

d. Respondent shall compensate Petitioner for any and all damages that she has suffered pursuant to 48 U.S.C. §§ 1983 and 1988, as this Court will determine at a subsequent hearing; and

e. Respondent shall reimburse Petitioner for costs incurred in this action.

WHEREFORE, Petitioner respectfully requests this Court to approve issuance of a Peremptory Writ of Mandamus by the Clerk or Deputy Clerk of the Second Judicial District Court for relief sought herein and set a hearing not later than ten days after issuance of the Writ for any challenge to the Writ.

Respectfully submitted,

J. EDWARD HOLLINGTON & ASSOCIATES, P.A.

J. Edward Hollington
Attorney for Petitioner Honorable Sara T. Harmon
708 Marquette Ave. NW
Albuquerque NM 87102
(505) 843-9171

52-5-2. Director; appointment; employees; workers' compensation judges.

A. The workers' compensation administration shall be in the charge of a director who shall be appointed by the governor for a term of five years with the consent of the senate. The appointed director shall serve and have the authority of that office during the period of time prior to final action by the senate confirming or rejecting the appointment. The appointment shall be made on the basis of administrative ability, education, training and experience relevant to the duties of the director. Upon the expiration of the term, the director shall continue to serve until the successor is appointed and qualified. Before entering upon the duties, the director shall subscribe to an oath to faithfully discharge the duties of the office. The director shall devote full time to the duties of the office. The director's salary shall be equal to ninety-five percent of that of district court judges.

B. The director shall appoint necessary workers' compensation judges. Workers' compensation judges shall not be subject to the provisions of the Personnel Act except as provided by Subsection C of this section. Workers' compensation judges shall be appointed for an initial term of one year and shall be compensated at a rate equal to ninety percent of that of district court judges. Ninety days prior to the expiration of a workers' compensation judge's term, the director shall review his performance. If approved by the director, the workers' compensation judge may be reappointed to a subsequent five-year term.

C. Workers' compensation judges shall be lawyers licensed to practice law in this state and shall have a minimum five years' experience as a practicing lawyer. They shall devote their entire time to their duties and shall not engage in the private practice of law and shall not hold any other position of trust or profit or engage in any occupation or business interfering with or inconsistent with the discharge of their duties as workers' compensation judges. A workers' compensation judge shall be required to conform to all canons of the code of judicial conduct as adopted by the supreme court, except canon 21-900 of that code. Violation of those canons shall be exclusive grounds for dismissal prior to the expiration of his term. Any complaints against a workers' compensation judge shall be filed with the state personnel board, which shall report its findings to the director.

D. Workers' compensation judges shall have the same immunity from liability for their adjudicatory actions as district court judges.

History: Laws 1986, ch. 22, § 28; 1987, ch. 235, § 46; 1987, ch. 342, § 31; 1989, ch. 263, § 71; 1990 (2nd S.S.), ch. 2, § 54.

The 1990 (2nd S.S.) amendment, effective January 1, 1991, in Subsection A, substituted "administration" for "division" near the beginning of the first sentence and [illegible] in Subsection B [illegible] workers' compensation judges [illegible] September 1, 1986 [illegible] April [illegible] and in Subsection C substituted "all canons of" for "canons 1, 2, 3, 4, 5, and 7 of" [illegible] except Canon 21-900 of that code. Violation" for "and violation" and the first sentence [illegible] regarding dismissal of judges.

Personnel Act. — See 10-9-1 NMSA 1978 and notes thereto.

A workers' compensation judge pro tem [illegible] [illegible]

52-5-3. Reports; data gathering.

A. [illegible]

EXHIBIT

1

State of New Mexico
WORKERS' COMPENSATION ADMINISTRATION

BILL RICHARDSON
GOVERNOR

ALAN M. VARELA
DIRECTOR

P.O. BOX 27198
ALBUQUERQUE, N.M. 87125-7198
(505) 841-6000
http://www.state.nm.us/wca

February 27, 2003

Ms. Sara Harmon
Workers' Compensation Administration
2410 Centre Avenue SE
Albuquerque, New Mexico 87125

Dear Ms. Harmon,

This is to inform you that effective tomorrow, February 28, 2003, at 5:00 p.m., your Exempt appointment as Workers' Compensation Administration Judge, will be expired.

After consultation with the Governor, review of our current organizational structure and the direction being established for the organization, I have decided to exercise my authority provided me in Chapter 52-5-2B of NMSA 1978 (copy attached).

Thank you for your service to the State of New Mexico and to the Workers' Compensation Administration.

Sincerely,

Alan M. Varela
Director

EXHIBIT

STATE OF NEW MEXICO
WORKERS' COMPENSATION ADMINISTRATION
POST OFFICE BOX 27198
ALBUQUERQUE, NM 87125-7198

Ms. Sara Harmon
Workers' Compensation Administration
2410 Centre Avenue SE
Albuquerque, New Mexico 87125

VERIFICATION

STATE OF NEW MEXICO)
) ss.
COUNTY OF BERNALILLO)

SARA T. HARMON, being first duly sworn, deposes and states upon oath that all representations in the foregoing Verified Petition for Peremptory Writ of Mandamus, are true as far as she knows or is informed and that the Verified Petition is true, accurate and complete to the best of her personal knowledge and belief.

Sara T. Harmon

SUBSCRIBED AND SWORN TO before me this 11th day of March, 2003, by Sara T. Harmon.

Notary Public

My Commission Expires:

12/17/2005

AFFIDAVIT

STATE OF NEW MEXICO)
) ss.
COUNTY OF SANTA FE)

Darlene M. Montoya states under oath:

1. I am a Legal Assistant for the Litigation Division of the Attorney General's Office.
2. The statements contained in this affidavit are based upon my personal knowledge.
3. I am one of the persons designated to accept service for the Attorney General's Office.
4. I have not received service of the writ of mandamus for State of New Mexico, *ex rel.* Honorable Sara T. Harmon v. Alan M. Varela, Director, New Mexico Workers' Compensation Administration, Second Judicial District Court Case No. CV-200301761
5. I have reviewed the Attorney General Office service logs and the service logs have confirmed that the above-referenced writ of mandamus has not been received by this office as of 12:00 pm on March 17, 2003.
6. I have questioned all relevant office personnel and none have received the above-referenced writ of mandamus as of 12:00 pm on March 17, 2003.

FURTHER AFFAINT SAYETH NOT.

Darlene M. Montoya
DARLENE M. MONTOYA

SUBSCRIBED AND SWORN to before me this 17th day of March, 2003 by Darlene M. Montoya.

Notary Public

My Commission Expires: 2/11/04

EXHIBIT
2

ENDORSED
FILED IN MY OFFICE THIS
MAR 2 7 2003
DOROTHY MADRID

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT COURT

STATE OF NEW MEXICO, ex rel.,
HONORABLE SARA T. HARMON,

Petitioner,

vs. No. CIV 2003 01761

ALAN M. VARELA, Director, NEW MEXICO WORKERS' COMPENSATION ADMINISTRATION,

Respondent.

PEREMPTORY WRIT OF MANDAMUS

To: Alan M. Varela, Director
New Mexico Workers' Compensation Administration
2410 Centre Ave., S.E.
Albuquerque New Mexico 87125

YOU ARE HEREBY COMMANDED FORTHWITH TO:

1. Comply with your mandatory non-discretionary duty to not dismiss Petitioner, Honorable Sara T. Harmon, as a Workers' Compensation Judge, before the expiration of her five-year statutory term as set forth in NMSA 1978, § 52-5-2B, unless Petitioner has been shown to have violated the Code of Judicial Conduct;

2. Immediately reinstate Petitioner to her position as a Workers' Compensation Judge, retroactive to February 28, 2003, for purposes of salary, judicial authority, compensation and benefits;

3. Reimburse Petitioner for her costs for bringing this action; and

4. Compensate Petitioner for damages she sustained pursuant to 42 U.S.C. §§ 1983 and 1988, in such amount as this Court shall determine at subsequent proceedings.

EXHIBIT
3

A copy of the Petitioner's Verified Petition for Issuance of Peremptory Writ of Mandamus is attached to this Writ as required by Rule 1-065E (NMRA 2003).

YOU ARE FORTHWITH COMMANDED TO PERFORM THE ABOVE MINISTERIAL DUTIES OR SHOW CAUSE BEFORE THIS COURT ON March 20 03 AT 8:30 AM IN THE COURTROOM OF HONORABLE Robert Thompson SECOND JUDICIAL DISTRICT COURT, 400 LOMAS NW, ALBUQUERQUE 87103, AS TO WHY THIS WRIT SHOULD NOT BE MADE PERMANENT. THE DATE FOR YOU TO FILE RESPONSIVE PLEADINGS SHALL BE 7 DAYS AFTER ISSUANCE OF THIS WRIT.

Approved:

Robert Thompson

____
Second Judicial District Court Judge

JUANITA ARMIJO-SISNEROS, CLERK OF DISTRICT COURT

CERTIFIED AS A TRUE AND CORRECT COPY OF THE ORIGINAL FILED IN MY OFFICE JUANITA G. ARMIJO SISNEROS, Clerk District Court.

Deputy

____
Clerk/Deputy Clerk
Second Judicial District Court

Date: 3-13-03

(SEAL)